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1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

12/9/2021 12:45 pm

2 **U.S. DISTRICT COURT**

3 **EASTERN DISTRICT OF NEW YORK**

4 **LONG ISLAND OFFICE**

CECIL THOMAS et al.,

Plaintiffs,

v.

5 TXX SERVICES, INC. et al.,

Defendants.

6 Case #2:13-cv-02789-SIL  
7 United States Courthouse  
8 Central Islip, New York  
9 November 22, 2021  
10 11:30 a.m. calendar

12 TRANSCRIPT FOR CIVIL CAUSE

13 - STATUS CONFERENCE -

14 BEFORE THE HONORABLE STEVEN I. LOCKE  
15 UNITED STATES MAGISTRATE-JUDGE

16 - A P P E A R A N C E S -

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34 (Proceedings recorded by electronic sound recording)

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1                   THE COURT: Good morning, everybody, this is  
2 Magistrate Judge Locke. Kristin, let's call the case.

3                   LAW CLERK: Sure, judge. Calling case 13-cv-2789,  
4 Thomas et al v. Txx Services Inc. et all. Counsels, please  
5 state your appearances for the record.

6                   MR. KIRSCHENBAUM: Maimon Kirschenbaum, for  
7 plaintiffs. Good morning, Your Honor.

8                   THE COURT: Good morning.

9                   MS. SCHULMAN: Denise Schulman, for plaintiffs.

10                  MR. PAGANO: JEFFREY PAGANO, on behalf of the  
11 defendants.

12                  MR. SAXE: Good morning, Your Honor, Ira Saxe, also  
13 for defendants.

14                  THE COURT: Good morning.

15                  THE COURT: We're here, let's see, I guess to discuss  
16 a view things. I got the project letters from I guess last  
17 week, docket entries 274 and 275, about a potential motion for  
18 sanctions, which we can talk about. Why don't we do that? I've  
19 read the letters, Mr. Kirschenbaum. What do you want to tell  
20 me?

21                  MR. KIRSCHENBAUM: A couple of things, just in quick  
22 summation and in response to yesterday's letter. First of all,  
23 with respect to the sanctity with this information, there's a  
24 lot more we could have told Your Honor if we were sharing what  
25 was under the mediation confidentiality agreement. The only

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1       thing we used for this letter was what Mr. Pagano himself said  
2       in open court and what he told us prior to any mediation  
3       agreement, which is that they pulled the Datatrack documents. I  
4       just want to be clear about all the points.

5               In our document requests, we asked very clearly for  
6       any data tracking plaintiffs' hours. Now, the defendants in  
7       their letter here say that this is not data that tracks  
8       plaintiffs' hours, but we were very, very clear in our  
9       deficiency letter of October 4<sup>th</sup> of 2017 that it was our  
10      understanding that plaintiffs owed timely scanned items upon  
11      delivery. And if there were records of those scans, we wanted  
12      those to be turned over.

13               Defendants, even in their letter yesterday, agree that  
14      in response to that letter, they told us they do not maintain  
15      that information. And so, when they asked about why we didn't  
16      follow up on it, it's because they told us it wasn't under their  
17      control, which is why we let it go only to learn that when  
18      defendants felt that they could use this information, which is  
19      obviously crucial to this case, they were able to pull it.

20               Defendants talk about an expense; I don't even know  
21      what expense they're talking about. Defendants did go through  
22      an expensive process, it appears, in the course of mediation of  
23      creating some sort of a report based on that data, but that's  
24      totally not the issue here. This is about simply the scan data  
25      for discovery plaintiffs. It was under defendants' control. We

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1 asked defendants for it; they told us it was not under their  
2 control, meanwhile, it was under their control because they were  
3 able to pull it from Datatrack.

4 Defendants talk about there having been some sort of  
5 damages-only discovery; that's just not true. Nowhere in this  
6 case was it ever discussed that there was damages only  
7 discovery. We specifically asked for the data; they didn't  
8 object on the grounds that we were only conducting liability  
9 discovery. And most significantly, they took a ton of discovery  
10 relating to damages from the plaintiffs. I cannot overstate how  
11 painful it is that at the end of an eight-and-a-half-year  
12 litigation, defendants turned up with data that goes to the  
13 heart of this case. They turned up with it because they thought  
14 it would help them now, but they denied having it under their  
15 control when we asked them for it multiple times.

16 THE COURT: Okay. So, then what are you asking for?

17 MR. KIRSCHENBAUM: We'd like to brief it and ask for  
18 sanctions and the negative inference.

19 THE COURT: Okay. Sanctions? What sanctions? First  
20 of all, what would a negative inference look like here, And  
21 then, what sanctions. Or is that it? Is that the only thing  
22 you want?

23 MR. KIRSCHENBAUM: The negative inference would  
24 essentially be that plaintiffs' hours worked are in accordance  
25 with what plaintiffs said in their interrogatories, and that

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1 can't be refuted by the data that's in the newly produced  
2 scanner reports. (B) That the scanner reports --

3 THE COURT: Well, that's not a negative inference.  
4 You want to preclude their evidence.

5 MR. KIRSCHENBAUM: I also want to preclude their  
6 evidence, yes. I want an inference that the data that they  
7 held, instead of turning it over, would corroborate what  
8 plaintiffs said in their interrogatories. I want the data  
9 itself to be precluded because we haven't had a full chance to  
10 ask any questions about. I should just point out, the  
11 defendants -- wait, I'll get to that in a minute. And then  
12 third, just a plain sanction for causing us to waste our time.  
13 Sanctions against defendants and their counsel for causing us to  
14 chase our tails when they actually should have produced it.

15 The one thing I just want to add to the equation,  
16 which I should have mentioned earlier, is that defendants  
17 currently have this data and they probably had it for months,  
18 for all we know, and they still haven't turned it over. And  
19 they magnanimously put in their letter yesterday that they would  
20 consider giving it to us. How in the world is it not currently  
21 information that they should have produced?

22 THE COURT: Okay. Mr. Pagano?

23 MR. PAGANO: First let's, Your Honor, take a look at  
24 what was requested in the request for production. It was "hours  
25 worked." The scan data does not demonstrate directly or

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1 indirectly hours worked. Why? Because the scan data scans when  
2 a transaction takes place in relation to a driver corporation.  
3 The driver corporation can deploy numerous individuals to engage  
4 and perform the service. It has nothing whatsoever to do with  
5 hours worked.

6 THE COURT: Now, how is it relevant to --

7 MR. PAGANO: And secondly --

8 THE COURT: Wait. Wait.

9 MR. PAGANO: Excuse me?

10 THE COURT: And how is it relevant to the mediation?

11 MR. PAGANO: That's the point. Just let me continue,  
12 Your Honor.

13 THE COURT: Go ahead.

14 MR. PAGANO: That data is then put in moment by moment  
15 into a database so that you can have a delivery occurring in  
16 Montauk at the same time occurring in Pennsylvania, and it would  
17 go into, what I call "a bucket" moment by moment. So, the data  
18 is not related to even a route, it's related to a time. So,  
19 that data was discussed in detail during the discovery process,  
20 and there are more communications, Your Honor, between counsel.  
21 And to the extent there are even emails from November 14<sup>th</sup> that  
22 say, "At this point, it looks like the only outstanding  
23 discovery issues are the ones we discussed -- production of tax  
24 returns, bank statements, and defendants' production of customer  
25 contracts and agreements."

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1                   This pot of data was discussed. And that time, it was  
2 in the possession, custody, and control, and opposing counsel  
3 was informed of a company called Datatrack. The company,  
4 meaning Txx, does not have control over that data. So, what  
5 happens --

6                   THE COURT: So, how can --

7                   MR. PAGANO: Hold on, Your Honor. What happens is,  
8 that data can be used for a DEA type investigation. In other  
9 words, was the delivery made. Then Datatrack would go into the  
10 data and pull up the scan. Your Honor, I've been on this case,  
11 as you know, for seven, eight years, and I've been passionate  
12 about the independent contractor status. So, what happened was,  
13 in the mediation, I decided and Ira as well, we stepped back.  
14 We called in another law firm and experts to see if this case  
15 could be settled. So, what happened was, that law firm deployed  
16 experts to dive into the pot and try to assemble the data in a  
17 way that could demonstrate, only as to a segment of people,  
18 solos.

19                   Remember, we have eight groups here. We have  
20 corporations that have multiple trucks and multiple people; we  
21 have corporations that have three or four people, two trucks;  
22 and we have solo corporation. So, the point that I made earlier  
23 is that, you can't tell from the swiping who swiped, and  
24 therefore, you can't tell whether or not a discovery plaintiff  
25 was the person who swiped it. So, what they did was, the

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1 experts pulled it together and just went through the data. I  
2 don't have the algorithms, I don't have a clue, Your Honor. But  
3 they went through and tried to assemble data as to one group for  
4 solos, the corporations with one person. So that at least you  
5 had some assurance that the one person, if they were a discovery  
6 plaintiff, the time spent scanning could be determined in some  
7 way.

8 Now, keep in mind, time between scanning is their own  
9 time. And there's evidence that they go to lunch, they meet up  
10 with their girlfriends, they do all sorts of things. But  
11 nonetheless, the experts put together this data and gave it to  
12 the other side, unfiltered, what our experts did. And it was  
13 total and complete disclosure. Until these experts were called  
14 in because Ira and I stepped back, that data, while discussed  
15 with opposing counsel, and she was given the opportunity to  
16 request it. And in fact, I have direct recollections of  
17 Datatrack. I had no intention of even playing with Datatrack  
18 until the mediation process came up in order to get a  
19 settlement. I wanted the case to go away for the interest of  
20 the client.

21 Now, they can have the data. Quite frankly, as a  
22 practical matter from my standpoint, the cost and expense  
23 was ours. They didn't want to incur the cost and expense  
24 to jump into the bucket to do what we did. That's why they  
25 walked from it in 2017. Even though, throughout the

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1 depositions, over 400 times discovery plaintiffs testified  
2 as to scans. So, Your Honor, when you think about  
3 sanctions, it's one thing to suggest that we did documents,  
4 it's another thing to suggest that we had actual control  
5 over. Because it goes to a third party. What we did was,  
6 reach out and get it during the process. But more  
7 importantly, they chose neither to ask us for it, beyond  
8 that one letter, even though there were multiple meetings  
9 afterwards through 11/17, nor did they go to Datatrack.

10 THE COURT: Here's the thing --

11 MR. PAGANO: So, I sit back --

12 THE COURT: Mr. Pagano?

13 MR. PAGANO: I sit back, Your Honor, --

14 THE COURT: Mr. Pagano? Mr. Pagano?

15 MR. PAGANO: I'm sorry.

16 THE COURT: Mr. Pagano, you still have answered my  
17 question. First, it's clearly relevant to some degree for  
18 the mediation because you've used it for that. Now, you've  
19 explained that it was only helpful with respect to either  
20 one class or a subset of the plaintiffs. I get that. But  
21 you can't say it's not relevant at the same time that you  
22 use it for your benefit. The other thing is you say that  
23 you don't have control, yet you were able to get the  
24 information. How did you get the information? Did you  
25 just call Datatrack and ask for it? How did that come into

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1 your, this co-counsel's, or expert's possession?

2 MR. PAGANO: Your Honor, I believe representatives of  
3 the experts and perhaps the company went to it. Your  
4 Honor, as to relevance, I'm not arguing relevance. I'm not  
5 arguing that we couldn't get it. I am saying, Your Honor,  
6 they had the opportunity to get it, and they said no, once  
7 it was described.

8 THE COURT: But didn't --

9 MR. PAGANO: Your Honor, I have --

10 THE COURT: I want to first make sure I'm  
11 understanding correctly. So, your discovery responses, and  
12 I'm predicting what Mr. Kirschenbaum is going to say, said  
13 you didn't have it. And then you're suing the absence of a  
14 conversation from a subsequence letter to say it wasn't on  
15 the table. That is a little less clear to me than it is to  
16 you in terms of the logic.

17 MR. PAGANO: No, Your Honor, the answer was, hours  
18 worked.

19 THE COURT: Right.

20 MR. PAGANO: We didn't have the documents, and we said  
21 at that time, we didn't have the documents. Now, in the  
22 discussions, there was no further answer to the original  
23 discovery response. In the discussions we had in the meet  
24 and confer, and they never moved on it, is when I described  
25 it, when Ira and I both described what Datatrack was, and

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1                   they walked from it in meet and confer. That's the  
2                   problem.

3                   THE COURT: Okay. Mr. Kirschenbaum, you wanted to  
4                   respond?

5                   MR. KIRSCHENBAUM: I want to interject just with a few  
6                   points. First of all, Interrogatory Number 12 reads, "All  
7                   documents concerning the timing of deliveries made by  
8                   plaintiffs to delivery location, including but not limited  
9                   to documents requesting the scheduled delivery times and  
10                   actual delivery times." The defendants' response is  
11                   subject to and without the waiver of four (inaudible)  
12                   objections, defendants respond that "Txx will produce  
13                   documents responsive to this request pursuant to the terms  
14                   of a confidentiality order." If there was any ambiguity,  
15                   we cleared it up in our very clear letter of October 4<sup>th</sup>  
16                   that we were looking for the information. Just because  
17                   it's still defendants' argument, and with all due respect  
18                   to Mr. Pagano, the truth is not being told right here.  
19                   Because what defendants are avoiding saying is that the  
20                   documents were clearly under their control when they  
21                   represented to us that the documents were not under their  
22                   control.

23                   There is no question of expenses. No one told us to  
24                   subpoena Datatrack, and defendants didn't get that  
25                   information by subpoenaing Datatrack. They asked

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1 Datatrack, I'm assuming, and I would be stunned to hear  
2 something different than this, we are your clients, you  
3 have our data, please give it to us. And by doing that,  
4 they were able to get the data. What we understood after  
5 our meet and confer was that defendants did not have that  
6 ability, which they even say. They say in the letter that  
7 they wrote to Your Honor last night that they told us they  
8 don't maintain the data. How much clearer? Would we have  
9 had to say, if you don't maintain it, can you print it?  
10 Like could you push a button and print it? Could you call  
11 Datatrack and get it? We've come to the point of saying;  
12 it depends on what "is" is. They said they didn't maintain  
13 it; we thought it wasn't under their control. We thought  
14 that those documents would never surface. They were  
15 plainly --

16 THE COURT: Mr. Kirschenbaum, when did you first learn  
17 about Datatrack?

18 MR. KIRSCHENBAUM: We learned about Datatrack; we knew  
19 about Datatrack during the course of discovery. As Mr.  
20 Pagano said, they testified that there were Datatrack  
21 documents. And that's why we wrote this letter --

22 MR. PAGANO: Your Honor --

23 MR. KIRSCHENBAUM: I'm sorry, Mr. Pagano.

24 MR. PAGANO: No, I'm sorry. I'm sorry. I'm sorry.

25 THE COURT: Go ahead.

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1                   MR. KIRSCHENBAUM: That's why we wrote this letter  
2 asking for this data. The letter says, it is our understanding  
3 that discovery plaintiffs electronically scanned the items, the  
4 records of those scans, which presumably include the time of the  
5 scans, would provide information of the hours, and therefore we  
6 ask for it. And defendants responded that they don't maintain  
7 it. So, we thought it was unavailable. And given that we  
8 thought that it wouldn't surface or couldn't surface easily, we  
9 let it go. Now, defendants, when they needed, just pulled it.  
10 So, it was unlike how they presented it, it was under their  
11 plain control.

12                   THE COURT: Okay. My next question --

13                   MR. PAGANO: Your Honor, if I --

14                   THE COURT: Okay. One second. One second. My  
15 question to you is when did you first learn about Datatrack?

16                   MR. KIRSCHENBAUM: I don't remember the date. Denise,  
17 do you remember when we learned about it? Not deep into the  
18 litigation.

19                   THE COURT: So, it was years ago.

20                   MS. SCHULMAN: Yeah, I'd have to go back and look into  
21 the depositions to see.

22                   THE COURT: The exact date doesn't matter, but years  
23 ago?

24                   MS. SCHULMAN: Yes.

25                   MR. KIRSCHENBAUM: Yes.

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1                   THE COURT: Okay. Assuming the representations were  
2 as you said, why not subpoena Datatrack to get that information?  
3 Because you didn't know that plaintiffs could get it, right?  
4 How come you didn't go for it that way?

5                   MR. KIRSCHENBAUM: We didn't go for it that way  
6 because we were happy going with our client's testimony instead  
7 of with the Datatrack data. If defendants couldn't pull it,  
8 then they couldn't pull it, and we let it go.

9                   MR. PAGANO: Well, why couldn't they have just  
10 subpoenaed Datatrack to come to trial at that time?

11                  MR. KIRSCHENBAUM: Well, for starters, we didn't know  
12 that the data could be pulled. It was never told to us that the  
13 data could be pulled by Txx or by Datatrack. And without  
14 defendants being able to pull any time records, we would have  
15 had a very strong benefit of now claimant's burden shifting in  
16 our favor. So, (A) it was never told to us that the data could  
17 be pulled; and (B) we would be able to make our case without the  
18 Datatrack information. However, the reality is, contrary to  
19 what defendants said, the data was actually fairly easily  
20 pullable.

21                  MR. PAGANO: Your Honor?

22                  THE COURT: Mr. Pagano, you're going to get to make  
23 every piece of the record you want to make.

24                  MR. PAGANO: Oh, I'm sorry. I'm sorry. I'm sorry,  
25 Your Honor.

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1                   THE COURT: Mr. Kirschenbaum, assume for the moment  
2 that this is a Rule 37 motion for sanctions. I think the  
3 caselaw says the sanction has to be the least -- I'm  
4 paraphrasing -- onerous as possible to put you in the position  
5 you're entitled to be in. Are there less onerous sanctions than  
6 what you're requesting? Meaning, why can't the Court direct,  
7 and I suspect Mr. Pagano would do this anyway, that they  
8 identify whoever it was, put that information together. You  
9 depose them; figure out what they have and what is getable, and  
10 then give it to you? Why isn't that a sufficient sanction?

11                   MR. KIRSCHENBAUM: Because the litigation is 8½ years  
12 old, and we'd have to fully reopen discovery to examine  
13 plaintiffs actually hours worked building off of that building  
14 block of the Datatrack data. It's a whole other world. It's  
15 basically a window into what plaintiff did in a day. We'd have  
16 to essentially litigate this case from scratch now, 8½ years in.  
17 It's mindboggling. This is exactly --

18                   THE COURT: I understand why you're saying it, and I  
19 understand your frustration given the way this has unfolded.  
20 I'm not sure I agree with you in terms of the outcome of this.  
21 You've got your client's version of what happened; they have  
22 some kind of computer printout that's relevant to at least some  
23 part of their version of hours worked. They compiled it through  
24 the use of what I'll call an expert, although I'll use a small  
25 'p' to describe that for now. And you cross examine them. And

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1 if there's more information that they have that you want, either  
2 you'll get it, unless they object, but I suspect you'll get it.  
3 Then, you should be done. Yes, it's an eight-and-a-half-year-  
4 old litigation, but that's partially the parties' fault too,  
5 right? Did Judge Feuerstein have it down for trial at some  
6 point?

7 MR. KIRSCHENBAUM: No.

8 THE COURT: So, apart from that, Mr. Pagano, tell me  
9 everything you want to tell me.

10 MR. PAGANO: Your Honor --

11 MR. KIRSCHENBAUM: Wait! Should I respond? Does Your  
12 Honor want me --

13 THE COURT: Go ahead. Sorry.

14 MR. KIRSCHENBAUM: Your Honor, this could potentially  
15 be hundreds and hundreds of thousands of data. At this point we  
16 don't have a way to tell Your Honor what gaping holes might be I  
17 there; what they've been told are not in there; are all the  
18 scans reflected? There could be enormous holes, and I would say  
19 that it would take years to conduct discovery just with respect  
20 to this data at this point.

21 THE COURT: Mr. Pagano, you've been waiting.

22 MR. PAGANO: Yes, Your Honor, that sort of says the  
23 point. You've got to remember, also in the discovery was  
24 proportionality in terms of production. We're talking about  
25 probably almost a 13-year period diving into a bucket based upon

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1 22 named plaintiffs. Like opposing counsel said, it took  
2 "Experts" to go through that information. That is what we  
3 discussed in the meet and confer. That neither side, at least  
4 at the time. And secondly --

5 THE COURT: Let's say you're entitled to do some of  
6 it --

7 MR. PAGANO: Yes.

8 THE COURT: -- (inaudible).

9 MR. PAGANO: Well, Your Honor, all I'm saying is, the  
10 cost and expense of going into 17 years of data with about 3,000  
11 owner/operators have provided services during that period of  
12 time. That's what you jump into unless you have an expert. And  
13 we could have given them that. And we offered to, and they  
14 said, "no". That's the point.

15 MR. KIRSCHENBAUM: So, they decided for themselves not  
16 to produce it. And to say that we said, "no" is the lie by the  
17 fact that we explicitly asked for it.

18 MR. PAGANO: No, you weren't in the meet and confer!  
19 Counsel, I am really upset at that, number one. And number two  
20 is, you weren't in the meet and confers, and you're not on the  
21 emails between --

22 THE COURT: Mr. Pagano, you're talking to me, not him.

23 MR. PAGANO: I'm sorry. Your Honor, there are emails  
24 back and forth on the entire response to the discovery and at no  
25 time was the Datatrack data requested by the other side. Even

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1 though they knew about it, after our explanation in the meet and  
2 confer. And, Your Honor, the suggestion as to Number 12, they  
3 wanted the scheduled delivery stops, Your Honor, we produced  
4 paper documents, TPOD's or proof of delivery. There's a scanner  
5 plus a written document that occurs when a transaction takes  
6 place. We produced those documents for the discovery  
7 plaintiffs. As well, we produced a segment called TPD in  
8 response to Number 12 concerning delivery documents, which was  
9 the bidding proposals by the independent contractors which sets  
10 forth the dates and the times that they would make deliveries.  
11 So, we gave them --

12 MR. KIRSCHENBAUM: Your Honor, the request said  
13 scheduled deliveries times and actual deliveries. The only  
14 thing that shows the actual delivery time is the scan data and  
15 that is excluded from the data we asked for on October 4, 2015.

16 THE COURT: Look. Look. I get the issue. I get both  
17 parts of what you're saying. Look, the letter asked for a  
18 briefing schedule. I'm going to let you brief this. I can't  
19 say "no" to a motion. Well, I can't say "no" to requesting to  
20 make a motion, and so, I'm going to let you brief this in full.  
21 The question here really seems to be factual rather than legal.  
22 You both refer to things that are attached to the letters, and I  
23 understand why. That's not to say your letters are incomplete,  
24 they're entirely appropriate.

25 With that being said, I also want to talk about what

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1 the contours of trial in this case would look like. Mr. Pagano  
2 referred to eight classes. And in your letter, Mr.  
3 Kirschenbaum, you said you're ready to go regardless of whether  
4 there's a motion for decertification, which you wouldn't oppose  
5 in any event. Is that right?

6 MR. PAGANO: No, Your Honor.

7 MR. KIRSCHENBAUM: I'm not sure what Mr. Pagano is  
8 talking about.

9 MR. PAGANO: Okay. Let me just throw out what I'm  
10 suggesting here. Number one, there's no need for  
11 decertification. Counsel agrees we'll go one by one if  
12 necessary. And my point was that we choose among the hundred  
13 people who fit within various groups. For example, Your Honor,  
14 there are those who are master contractors who operate  
15 corporation with multiple vehicles, multiple helpers. Then  
16 there's the plaintiffs deployed, those plaintiffs who are  
17 actually deployed by master contractors. So, they're not a  
18 corporation, they're the ones employed. Then there's a group,  
19 the plaintiffs who provide no services that use others to  
20 operate the corporation, and others perform the services even  
21 though these people have performed no services for the  
22 plaintiffs.

23 The fourth one would be the plaintiffs who sold their  
24 corporation and disposed of them but received income from the  
25 services provided by the people who now own the corporation.

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1 The next one is plaintiffs who are only helpers to a  
2 corporation. In other words, they weren't drivers, they were  
3 helpers. There are some plaintiffs in the group that are  
4 helpers in that regard. Then there's another group that we can  
5 segregate called plaintiffs or driver corporations that service  
6 banks. Banks are a totally different thing. We can segregate  
7 that as opposed to pharmacies. And then we have the solo  
8 contractors. The next one is the solo contractors, AM solo and  
9 PM solos. Solos are one person, one driver corporation. AM,  
10 they do the duties, and then there's those who are in the PM.  
11 Again, driver corporations.

12 You see the platform, Your Honor, it is our position  
13 that the plaintiff allows this type of business discretion. And  
14 there are some plaintiffs who sit within these various groups.  
15 And it's only fair to look at the groups --

16 MR. KIRSCHENBAUM: Can I jump in for a second?

17 MR. PAGANO: Well, wait a minute, counsel. Counsel,  
18 please --

19 THE COURT: Let him finish, you'll get your chance.  
20 Go ahead. Finish what you're saying, Mr. Pagano.

21 MR. PAGANO: And then we segregate it by groups, and  
22 then the jury would issue a verdict by group because you may  
23 have different outcomes. For example, a person who's claiming  
24 that I work 70 hours a week, and the evidence shows that that  
25 person never even stepped into a vehicle, but somebody else did

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1 the work, that person should get nothing. Likewise, a master  
2 owner who has five different trucks, who performed no services,  
3 they should get nothing. Or a master who, for example, appears  
4 to deliver when somebody in his workforce is sick. That would  
5 be the focus. And then we can go through these groups. Then  
6 we'd have a special verdict for each group. And then we can go  
7 from there into liability, if any.

8 THE COURT: Mr. Kirschenbaum, respond to that.

9 MR. KIRSCHENBAUM: Just to put it bluntly, (A) there's  
10 collective right now. Are defendants moving forward with the  
11 collective or not? They may have great ideas of how they think  
12 the trial should move forward, but either we're a hundred  
13 individuals or we're a collective. And question number one is,  
14 are defendants moving to decertify that collective or not?

15 MR. PAGANO: Yes.

16 MR. KIRSCHENBAUM: It's not just like free reign for  
17 them to sort of put some members together of a class. Now, the  
18 subclasses that they're talking about, there will be some much  
19 factual disputes, as to who goes into what class, that would be  
20 many trials in and unto itself. I can tell you, Your Honor,  
21 that if somebody never drove a truck, if that is the choice  
22 about a plaintiff, then we agree that that plaintiff is not owed  
23 overtime.

24 So, I think if we start with the point, are defendants  
25 decertifying or not? And if they are decertifying, well then

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1 the status is that there are 100 individuals. And then the  
2 question is, some of these individuals, should they be going to  
3 trial? It could be one; it could be two, it could be three.

4 THE COURT: Some of them should? I lost you. Some of  
5 them should go to trial?

6 MR. KIRSCHENBAUM: We should talk about getting a  
7 trial schedule for some of the people to get the ball rolling.  
8 It could. You know, defendants can't now, set up their own  
9 class. Do they want to move for some new kind of class  
10 certification?

11 MR. PAGANO: Your Honor, we're going to move for  
12 decertification.

13 MR. KIRSCHENBAUM: All right. Then, we're all here  
14 now in open court. Defendants are going to move for  
15 decertification; plaintiffs do not oppose decertification. So,  
16 that issue should be settled right now.

17 THE COURT: Can we just stipulate to that?

18 MR. KIRSCHENBAUM: Yes. We stipulate to  
19 decertification right here and now.

20 THE COURT: I want to hear from Mr. Pagano. I heard  
21 you. Mr. Pagano, do you agree?

22 MR. PAGANO: Yes, Your Honor.

23 THE COURT: Okay. So, the class is decertified. And  
24 what will happen is, we need to put our heads together to make  
25 this efficient. And I want to float just a couple of ideas. If

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1 the class is decertified, let's say there are 100 people  
2 involved. Then we've got 100 separate trials on the horizon  
3 unless we can somehow consolidate. Is that correct?

4 MR. KIRSCHENBAUM: What we had in a similar case in  
5 the Eastern District of New York, we set a trial run for three  
6 plaintiffs, and then we said we would regroup just so that there  
7 would be some familiarity with what would likely come up in  
8 these trials and how the issue should go forward. And then we  
9 said, at the end of those three trials, we'll put our heads  
10 together and think about how to deal with the rest of the  
11 plaintiffs.

12 THE COURT: Okay. Let me add something in, and then,  
13 Mr. Pagano, I'd like your response to all of it. Right now,  
14 this is set as a jury trial. I don't know that that's a very  
15 way to go in the context of a case like this to a panel jury,  
16 after jury, after jury when the topic here will be mind-numbing,  
17 honestly. I think it's going to be hard to accomplish. So, I  
18 just want you to think about that, and I'm throwing it out  
19 there. You both have a right to a jury, and I get it, but I'm  
20 just giving you my experience when it comes to cases like this,  
21 and how much you're really going to get from a jury. So, Mr.  
22 Pagano, respond to all of that.

23 MR. PAGANO: Okay. We stipulate as to the  
24 decertification.

25 THE COURT: Right.

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1                   MR. PAGANO: The groups that I came up with is a way  
2 of choosing people and focus. Your Honor, we don't need a jury  
3 trial from our perspective. So, from our perspective, we're  
4 fine with Your Honor deciding these cases. The idea though is,  
5 at least the way I've divided them up, one of our defenses, and  
6 I think it's important, is you have a platform that is the Txx  
7 platform. And the business of delivery, and how and why, and  
8 under what circumstances is up to the contractor. That's why I  
9 divided it up into eight groups that I've counted that reflect a  
10 business decision by each plaintiff to operate one way or the  
11 other. So, as a practical matter, maybe there's a way of  
12 agreeing on eight or ten plaintiffs at the outset among these  
13 groups. That would accomplish my goal of ensuring before Your  
14 Honor that our legal position is properly maintained, meaning  
15 platform 'Y', while at the same time, giving you an insight how  
16 maybe one person may be is dependent upon Txx and that's who  
17 they are as a human, and they ask more questions than another  
18 person, who's operating four or five trucks. And this way you  
19 could have inconsistent outcomes based upon their dependency  
20 that they chose to effectuate.

21                   THE COURT: I can also see that as a potential outcome  
22 for this case. I get that. Mr. Kirschenbaum, do you want to  
23 respond to that? You don't have to because you're not going to  
24 get a decision on it right now. But I want to start  
25 crystalizing how this is going to go.

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1                   MR. KIRSCHENBAUM: I don't fully comprehend what  
2 defendants are saying. The biggest problem to me with what  
3 defendants are saying is figuring out who goes into what  
4 platform. It's so ripe with factual issues that it's going to  
5 create more than help. I know why it's really good for  
6 defendants because then they get to decertify and do everything  
7 in one fell swoop. But there's a traditional model employed in  
8 court, and we briefed this in the last case when there are many  
9 individuals plaintiffs. And usually, it's my understanding,  
10 that the accepted efficient model is to do a couple of test  
11 trials and then see where that brings the parties viz-a-viz one  
12 another pending the outcome of those trials.

13                   THE COURT: And who would pick the plaintiffs in those  
14 trials? And how many plaintiffs would be in each trial in your  
15 model?

16                   MR. KIRSCHENBAUM: I mean, I would like it if we  
17 picked the plaintiffs trials to be brought.

18                   THE COURT: Yes, I'm asking you, if you pick them,  
19 what would the first three trials -- who would they be?

20                   MR. KIRSCHENBAUM: I'd pick three and put them in one  
21 trial. I could identify them fairly quickly. Not on this  
22 telephone call, but by the end of the week.

23                   THE COURT: No, I'm not asking you to identify anybody  
24 on this telephone call.

25                   MR. KIRSCHENBAUM: Right.

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1                   THE COURT: But with respect to that, given the  
2 deficiencies that Mr. Pagano is hoping for, how would you  
3 categorize them? Meaning, are these single owner operators? Do  
4 any of them have trucks or multiple drivers with helpers? How  
5 would you categorize them in terms --

6                   MR. KIRSCHENBAUM: We can talk about this more in  
7 detail. People who didn't drive, are very few. Generally,  
8 there's a group called *solos*, which is like the main category of  
9 a person who had a contract and drove a truck, drove one truck.  
10 There are a lot of people like that. Like almost of the  
11 discovery plaintiffs. And that's a group that those people  
12 cover because I think they represent just the most traditional  
13 model.

14                  THE COURT: Okay. So, then how would we deal with the  
15 nontraditional model?

16                  MR. KIRSCHENBAUM: Well, again, with respect to the  
17 nontraditional model, there's really one particular variant,  
18 which is a helper. That's a person who drove a route and did  
19 not have a contract. And so, from our view, those are the two  
20 main groups. Then there are like real outliers, who are truly  
21 outliers and that's a tiny group. We can meet and confer with  
22 defendants if it's true that there is one person you know who  
23 didn't drive in six years. I don't need to go to trial on that  
24 person to decide that that person is not owed any overtime  
25 money. That person is just not owed overtime money, I can tell

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1 you right now.

2 THE COURT: Okay. And you'll think about whether we  
3 need a jury for all this, yeah?

4 MR. KIRSCHENBAUM: Yes.

5 THE COURT: Okay. All right. Let's set the briefing  
6 schedule that you want, and this time you'll be able to give me  
7 all the exhibits that are relevant to it. How much time do you  
8 need for motion papers, Mr. Kirschenbaum?

9 MR. KIRSCHENBAUM: Can I ask Your Honor just one thing  
10 before that?

11 THE COURT: Yes.

12 MR. KIRSCHENBAUM: It seems to me like we'd be dealing  
13 with a full deck of cards if we could take a short 30(b) (6)  
14 deposition of the person that knows how the data is pulled from  
15 Datatrack.

16 THE COURT: Well, that could certainly be an outcome  
17 of the motion, but okay. Mr. Pagano, where do you stand on  
18 allowing this expert, as you described it with a capital 'E' to  
19 be deposed? That's what you want, right?

20 MR. KIRSCHENBAUM: Well, I'm talking about a 30(b) (6),  
21 a person within Txx. The expert, I think Mr. Pagano was  
22 referring to, is an expert from the third party.

23 THE COURT: So, what is it you want a 30(b) (6)  
24 deposition for?

25 MR. KIRSCHENBAUM: A 30(b) (6) to explain to us what

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1 Txx did to get the information. They can tell us what they  
2 asked an expert to do or whatever, I want it to be Txx's  
3 representation, not a non-Txx person.

4 THE COURT: Okay.

5 MR. PAGANO: Your Honor, I'm opposed to that because  
6 as a practical matter, it's not relevant to the sanctions  
7 motion. In reality, here are the facts. Your Honor, what they  
8 did to get it, you've got to understand at least from our  
9 perspective, we discussed this in the meet and confer and told  
10 them what it would take, and they walked away. It's not a  
11 question of whether we could get it, that was just part of it.  
12 The question is, what it would take to get it, meaning the  
13 burdensome issue, and secondly, whether they wanted to do it  
14 because we weren't going to do it.

15 THE COURT: Okay.

16 MR. PAGANO: It's too burdensome. So, that's the  
17 legal issue that I think has to be decided in the motion. And  
18 then if you say, okay they get the data, which by the way, we  
19 gave it to them. Now, if they want all the data, they're free  
20 to have all of it. We'll just have to figure a way how to do  
21 it. We still don't know physically how to do it to get it to  
22 them. I wasn't involved, Your Honor. I mean directly. I had  
23 another firm and these experts come in because I wanted the case  
24 settled. So, --

25 MR. KIRSCHENBAUM: Your Honor, behind --

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1 MR. PAGANO: Wait a second, let me finish, Maimon.

2 MR. KIRSCHENBAUM: No, he's correct, I thought he was  
3 done.

4 THE COURT: Let him finish.

5 MR. PAGANO: Meaning, the bottom line on a 30(b) (6)  
6 is, you've got to look at the answer to the request to produce.  
7 It covers it in numerous ways, burdensome and not within our  
8 control. But more importantly, Your Honor, fundamentally, we  
9 discussed it. And there are emails that don't talk about  
10 Datatrack directly, but basically say, there's nothing left,  
11 except for A, B, and C in an email, and that's November, I  
12 believe, 17<sup>th</sup>. So, that's why we left it.13 And then the depositions were taking place and they  
14 discussed the scanners throughout the depositions. Nothing was  
15 raised. Jeff, would you please the scanning data? Nothing.  
16 So, that's why from our standpoint, as practical matter, what's  
17 really going on here, I think it's underneath it all, is that  
18 when you go through the data after it's organized by experts,  
19 and I've heard opposing counsel say, look, we have experts,  
20 we'll go through it. We'll go through it, and we'll come up  
21 with our conclusions. Because they're free to do that. I don't  
22 have a problem with it. But the bottom line is, what it shows  
23 is, is that nobody worked over seven to eight hours a day. If  
24 you take that data and use it the way in which plaintiffs want  
25 it to be used. That is the problem.

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1                   MR. KIRSCHENBAUM: This is the data that Mr. Pagano  
2 said about 20 minutes ago, is not relevant to this case, (A).  
3 And (B) is --

4                   MR. PAGANO: It's not. It's not, counsel, because we  
5 don't know who did the scanning.

6                   THE COURT: You're talking to each other.

7                   MR. PAGANO: All we know is, --

8                   THE COURT: You're talking to each other.

9                   MR. PAGANO: -- you're saying that you were on a run,  
10 and all I'm saying is --

11                  THE COURT: Mr. Pagano?

12                  MR. PAGANO: Yes?

13                  THE COURT: Mr. Pagano, you're talking to each other  
14 again. Stop.

15                  MR. PAGANO: Okay.

16                  THE COURT: You're also both repeating yourself. Let  
17 me make this easy. The application for the 30(b)(6) deposition  
18 is granted. How long will it take to produce that witness?

19                  MR. PAGANO: I don't know, Your Honor. I'll call the  
20 client and I'll get back to opposing counsel.

21                  THE COURT: Mr. Kirschenbaum, put together a proper  
22 notice, so that you have the list, so that Mr. Pagano will have  
23 a list of the topics. It's all going to be related to getting  
24 information, and I don't think it will be a very long list,  
25 frankly. But let's do this properly. It can be in the letter,

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1 but you should have the topics, A, B, C, D. Okay?

2 MR. KIRSCHENBAUM: Yes.

3 THE COURT: How long will it take to put that  
4 together?

5 MR. KIRSCHENBAUM: We could have it by the end of the  
6 week.

7 THE COURT: Okay. What I'm going to do is give you 60  
8 days to put that together, and then that should be enough time  
9 for you to get through the holidays, and produce this witness,  
10 Mr. Pagano. Unless you tell me something different.

11 MR. PAGANO: Your Honor, the only thing is, I'm on  
12 trial January and February in New Jersey.

13 THE COURT: Two months?

14 MR. PAGANO: I'm on trial for two months.

15 THE COURT: Okay. I'll conference --

16 MR. PAGANO: I apologize. And then Ira is out I think  
17 a week or two in March. That's our only limitations.

18 THE COURT: Do you both have to be at this deposition,  
19 or can one of you attend this?

20 MR. PAGANO: I'm certain Ira and I can figure it out.  
21 That's not a worry. That's not a worry. I just wanted to  
22 let --

23 MR. KIRSCHENBAUM: Your Honor, we can take this  
24 deposition in December, just to be clear. I mean, are you  
25 kidding? There's been so much delay here.

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1                   THE COURT: You're saying there's been so much delay  
2 like it's one person who's created it, and that's not the case.  
3 I don't believe that. So, I'm sympathetic on the one hand, on  
4 the other hand, the hopes of managing this case in an efficient  
5 way went out the window years ago. So, I'm always going to  
6 accommodate trial schedules, honestly. And you can put this out  
7 by the end of the week. But if Mr. Pagano says his witness is  
8 travelling for the holidays or whatever, I'm not going to get  
9 underneath it, I'm telling you that now. So, work it out or  
10 don't, but I'm going to give you an end date by which this will  
11 be done. You're on trial until the end of February, Mr. Pagano?

12                   MR. PAGANO: Yes, Your Honor. And by the way, I just  
13 remembered. To your point a moment ago, the witness I know is  
14 out of the country in December and part of January. I recall me  
15 speaking to the person and them telling me, Jeff, don't do  
16 anything during those months.

17                   THE COURT: Okay.

18                   MR. KIRSCHENBAUM: Your Honor, we're perfectly okay  
19 with taking a remote deposition, just for the record.

20                   THE COURT: Okay. Mr. Saxe, are you still on the  
21 phone?

22                   MR. PAGANO: Ira?

23                   THE COURT: Mr. Saxe?

24                   MR. SAXE: Oh, yes, Your Honor, I apologize. I was on  
25 mute.

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1                   THE COURT: Okay. No problem. What is your trial  
2 schedule? Are you on the same trial in January and February, or  
3 do you have something else?

4                   MR. SAXE: No, no, no. I have a family vacation out  
5 of the country in March. No, I'm not on that trial.

6                   THE COURT: So, get this done by mid-February. You'll  
7 have till February 15<sup>th</sup>, unless that's a weekend, in which case,  
8 I'll tweak the date. You have a 30(b) (6) deposition. Mr.  
9 Kirschenbaum, obviously, you can have more than till the end of  
10 the week to get this notice together. But if you want to do it  
11 by the end of the week, that's fine too.

12                  MR. KIRSCHENBAUM: Okay.

13                  THE COURT: Well, I'm going to put it down. Pick a  
14 date, I'm going to put a date in the order. You can pick the  
15 date.

16                  MR. KIRSCHENBAUM: All right. Let's make it next  
17 Tuesday then, since we're already pushing this out.

18                  THE COURT: All right. What's the date of next  
19 Tuesday?

20                  MR. KIRSCHENBAUM: One second. The date of next  
21 Tuesday --

22                  MS. SCHULMAN: It's November 30<sup>th</sup>.

23                  THE COURT: November 30<sup>th</sup>. Okay. And I don't know if  
24 you want this for the record, the reason I'm granting the motion  
25 is because I get where Mr. Kirschenbaum is coming from in terms

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1 of the order in which the communications were given to him about  
2 what was not obtainable and then what appeared, subsequently, at  
3 the mediation. So, I get it. So, I think you're entitled to  
4 get underneath it. That being said, I don't know which are  
5 fines when you kick those tires, but after that, we'll have a  
6 conference, and we'll talk about briefing this motion.

7 I would like you to put some thoughts into the  
8 contours of what the trial is going to look like. I'm all about  
9 efficiency, so if both of you have wildly different opinions on  
10 how it should go, I'll just have to make something up, honestly.  
11 So, think about it. If you can work together, that would be  
12 helpful, but if not, okay. Kristin, what do we have? The end  
13 of February for a conference, Kristin.

14 LAW CLERK: Sure, judge. So, we are looking at  
15 February 28<sup>th</sup> at 11:00 a.m.

16 THE COURT: Okay. And that will be a phone call.

17 MR. PAGANO: Your Honor, if I can interrupt here? My  
18 trial ends on the Friday before. I guess that's the 25<sup>th</sup>. Okay.  
19 I just don't know how I'll be prepared because trial ends on the  
20 25<sup>th</sup>.

21 THE COURT: Look, you're either going to resolve this,  
22 or I'm going to set a briefing schedule. I don't think it's  
23 going to require a lot of in-depth preparation for the next  
24 conference.

25 MR. PAGANO: Okay. Okay, Your Honor. Okay. That's

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1 fine. Okay.

2 THE COURT: We can talk about trial then, but I want  
3 to brainstorm about trial. I'm not going to issue an order  
4 about what the trial is going to look like at that conference  
5 either.

6 MR. PAGANO: Okay.

7 THE COURT: So, think about it.

8 MR. PAGANO: Okay.

9 THE COURT: All right. So, Mr. Kirschenbaum, I don't  
10 know if I cut you off, but you definitely wanted to say  
11 something.

12 MR. KIRSCHENBAUM: If I could be so bold about that  
13 February 28<sup>th</sup> date, what I'd like to do is use this time, between  
14 then and now, to meet and confer with defendants about a  
15 manageable trial program/schedule format, and to admit to Your  
16 Honor, before that conference, if we agree, what we've agreed  
17 to, and if we don't agree, what our competing suggestions are.

18 THE COURT: Okay. Well, here's what I'm going to  
19 suggest. Mr. Pagano, you can respond, but I'm going to direct  
20 you, yes, to meet and confer. In terms of submitting something  
21 before, if you can, fine. If not, like I said, I'm not going to  
22 issue orders. If it has to be shortly after, that's also fine.  
23 I'm not married to the February 28<sup>th</sup> date, but you should meet  
24 and confer regarding the contours of the trial. That, and --

25 MR. PAGANO: Your Honor?

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1                   THE COURT: Yes, go ahead.

2                   MR. PAGANO: Oh, I'm sorry. The only thing is, again,  
3 I'm on trial January/February. I don't know what I can get done  
4 between now and January. That's my problem.

5                   THE COURT: Okay.

6                   MR. PAGANO: That's what counsel is asking for. Let's  
7 put it this way. If I can do it, I will. As long as, Your  
8 Honor, you understand that the trial ends on the 25<sup>th</sup>.

9                   THE COURT: Let's approach this differently. It's  
10 still only November, why don't you do it in the next two weeks?

11                  MR. KIRSCHENBAUM: We could do that. And I feel like  
12 if we submitted something to Your Honor earlier, we might  
13 actually cover more ground in February.

14                  THE COURT: Meet and confer about it. If you can  
15 submit something in writing, I agree, that will be fine. Mr.  
16 Kirschenbaum, you can certainly do it. I'd like to see  
17 something, even if it says, this is what we agree on, this is  
18 what we don't agree on. This is what plaintiffs want, this is  
19 what we don't agree on. This is what defendants want. Anything  
20 like that would be helpful. But see what you can work out in t  
21 meet and confer. I understand you're on trial, Mr. Pagano, I  
22 get that, and we'll work around it, but, Mr. Saxe, there's no  
23 reason why you can shuttle through the defendant's portion of  
24 the letter in that regard also, so that Mr. Pagano doesn't have  
25 to (inaudible) writing his section. So, we'll do it that way.

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1 Is there anything else?

2 MR. SAXE: Yes, Your Honor. Thank you, Your Honor.

3 MR. KIRSCHENBAUM: So, when does Your Honor want that  
4 submission?

5 THE COURT: I'll take it anytime, but the week before  
6 the conference is fine. Because I'm going to have to re-read it  
7 anyway.

8 MR. KIRSCHENBAUM: Okay.

9 THE COURT: I'm just taking notes for the moment.  
10 Okay. Is there anything else?

11 MR. KIRSCHENBAUM: I think we're good.

12 THE COURT: Okay. Mr. Pagano, anything else from you?

13 MR. PAGANO: Nothing, Your Honor.

14 THE COURT: Ira, anything?

15 MR. SAXE: No, thank you, Your Honor.

16 THE COURT: All right. Have a good holiday.

17 ALL COUNSEL: Thank you.

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19 CERTIFICATION

20 I, Rochelle V. Grant, approved transcriber, certify  
21 that the foregoing is a correct transcript from the official  
22 electronic sound recording of the proceedings in this matter.

23 Rochelle V. Grant

24 December 5, 2021

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